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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

NO. 85-2031

UNITED STATES OF AMERICA,

PETITIONER,

V.

SOL C. SCHWARTZ AND RAYMOND F. LANE,

RESPONDENTS.

BRIEF OF RESPONDENT IN OPPOSITION TO GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO GOVERNMENT'S PETITION FOR CERTIORARI

STATEMENT OF FACTS

The procedual posture of the case and the alleged facts are accurately set out in the opinion of the court below. Petition, Appendix A, p. 1a. The government fails to mention that the district court specifically found the government had completely failed to prove almost all its allegations.[1] However, because most of the government's factual references are not germane to the government's petition in light of the district court's ruling, it is not felt necessary to dispute their accuracy.[2] The opinion below of the court of appeals sets forth those facts necessary to resolution of the issue presented by the government's petition.

DISCUSSION

The government's petition, rather than presenting an important question not previously decided by this Court, presents an issue clearly covered by this Court's prior rulings that the Double Jeopardy Clause prohibits a government appeal after an acquittal of a defendant.[3] The decision of the court of appeals

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[1] As just one example, at page 4 of its Petition, the government claims that Lane and Marolda agreed to reopen the bidding on contracts to administer their locals' benefit plans and to rig that bidding. Yet the district court found "There is absolutely no evidence about obtaining money or property from the Local 19 benefit plans." Petition, Appendix A, p. 36a.

[2] The district court pointed out that there were "several gaping areas" in the government's proof, and that while the district court could point out more, it was just going to point to three of those failures of proof. Petition, Appendix A, p 36a. In fact, the district court never found that the government had proved any of its allegations. The district court only specifically pointed out some of the government's failures, not all.

[3] Respondent Lane also joins in all the arguments set forth in Respondent Schwartz's memorandum in opposition to the petition for certiorari. The position of both respondents is identical.

in this case follows the holdings of this Court and not only is not in conflict with the holding in United States v. Maker, 751 F.2d 614 (3d Cir. 1984), cert. denied, 105 S.Ct. 3479 (1985), but is consistent with Maker.

This Court has recently restated its well-established rule that under the Double Jeopardy Clause the government may not appeal from a judgment of acquittal based on a ruling by the trial judge that the evidence is insufficient to establish a defendant's factual guilt. Smalis v. Pennsylvania, 106 S.Ct. 1745, 1748 (1986). An appeal is not barred, however, where the ruling is based on a ground not related to factual guilt or innocence. United States v. Scott, 437 u.S. 82, 99 (1978). In the present case the district court specifically stated when granting the judgment of acquittal that "it is the opinion of this Court that in the light of the evidence a reasonable juror could not find beyond a reasonable doubt that the defendants had participated in a unitary scheme to defraud as charged in the indictment." Petition, Appendix A, p. 36a-37a.[4]

The government's argument is that the courts below did not identify any element of the offense of mail fraud that the government did not prove. That argument is frivolous. Both the district court and the court of appeals found that the government had failed to prove the alleged scheme to defraud.

Prior to the trial the respondents had moved to dismiss each count of the indictment on grounds of multiplicity. The

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[4] While respondent recognizes that the trial court's characterization of its action does not control for double jeopardy purposes, United States v. Scott, 437 U.S. at 96, the district court's statement clearly showed that it was making a factual determination.

government assured the district court that it would prove a unitary scheme to defraud. The district court found the indictment charged a single scheme to defraud but warned the government that under United States v. Mastelotto, 717 F.2d 1238 (9th Cir. 1983) and United States v. Miller, 715 F.2d 1360 (9th Cir. 1983), modified, 728 F.2d 1269 (1984), rev'd 105 S.Ct. 1811 (1985), the government would have to prove the unitary scheme to defraud. At the time of the trial Mastelotto and Miller governed multiple-object fraud cases in the Ninth Circuit.

The district court found the government did not prove the scheme to defraud. The scheme to defraud is clearly the most important element of wire fraud. The court of appeals found that:

> The actions and words of the district court clearly show that it evaluated the government's evidence under the prevailing legal standards and determined that that evidence was legally insufficient to sustain a wire fraud conviction as indicted. This can only amount to an acquittal on all thirteen courts that went to trial.

Petition, Appendix A, p. 7a. The court of appeals agreed that the district court found a failure of proof on the essential element of the scheme to defraud.

The government contends that the district court did not find the proof insufficient as to two of the benefit plans.[5] The government does concede, as it must, that the district court found the evidence insufficient with respect to the other four benefit plans, and thus that the government did not prove the scheme to defraud. The district court's finding of

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[5] It must be emphasized that the district court did not find that there was sufficient evidence to go to the jury regarding these two benefit plans. The district court was silent on that issue, indicating that it was pointing out only some of the gaping holes in the government's proof.

this failure was a finding of failure to prove the single scheme to defraud, the most important element of the offense.

This Court's later reversal of Miller is irrelevant to the double jeopardy analysis, as the court of appeals recognized.[6] In Smalis v. Pennsylvania, 106 S.Ct. at 1748 n.7, the state argued that the trial court in finding the evidence insufficient, erred in determining the degree of recklessness necessary for conviction. This Court reiterated the rule that:

> "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles'... affects the accuracy of that determination but it does not alter its essential character." United States v. Scott, 437 U.S. at 98, 98 S.Ct., at 2197 (quoting id., at 106, 98 S.Ct., at 2201 (Brennan, J., dissenting)). Accord, Sanabria supra; Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164(1984).

Smalis v. Pennsylvania, 106 S.Ct. at 1748 n.7. The district court's determination of the proof necessary to show a scheme to defraud in the present case is indistinguishable from the determination of the degree of recklessness made by the trial court in Smalis.

The present case is very similar to Sanabria v. United States, 437 U.S. 54 (1978). In Sanabria, the defendant was charged in a single count with conducting an illegal gambling business, involving horse wagering and numbers betting. The government presented no evidence of the defendant's involvement in the horse wagering and the trial court excluded

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[6] The reversal of Miller assures that these circumstances will not arise again. Thus, the government's petition does not present an important issue that will recur.

evidence of the numbers betting. The trial court then acquitted the defendant on the overall charge.

This Court assumed that the trial court erred in excluding evidence of the numbers betting, yet held that the government could not appeal the suppression order or the judgment of acquittal. The Court stated that:

> Legal consequences ordinarily flow from what actually happened, not from what a party might have done from the vantage of hindsight. The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, "in case any other proceedings are taken against [the defendant] for a similar offence, . . . the record [will] show with accuracy to what extent he may plead a former acquittal or conviction."
>
> With regard to the one count that was in fact charged, as to which petitioner has been at least formally acquitted, we are not persuaded that it is correct to characterize the trial court's action as a "dismissal" of a discrete portion of the count. While form is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution, neither is it appropriate entirely to ignore the form of order entered by the trial court. Here the District Court issued only two orders, one excluding certain evidence and the other entering a judgment of acquittal on the single count charged. No language in the indictment was ordered to be stricken, nor was the indictment amended. The judgment of acquittal was entered on the entire count and found petitioner not guilty of the crime of violating 18 U.S.C. § 1955.

437 U.S. at 65-67 (citations and footnotes omitted). The Court concluded that the double jeopardy clause barred reprosecution of any aspect of the charges, including the numbers betting allegations. The Court further stated, "[t]hat judgment of acquittal, however erroneous, bars further

prosecution of any aspect of the count and hence bars appellate review of the trial court's error." Id. at 69.

In the present case, the government presented all its evidence, which the district court examined and found insufficient. The district court acquitted respondents on each count in which they were charged with the overall scheme. Clearly the district court, in finding the evidence of the overall scheme insufficient, made a finding identical to that of the district court in Sanabria. The government's attempt to distinguish Sanabria in its petition fails. The district court found a failure to prove the scheme charged, and acquitted respondents in every sense of the word. Once the district court found the evidence insufficient, this appeal was barred by the Double Jeopardy Clause. See Justices of Boston Municipal Court v. Lydon, 104 S.Ct. 1805, 1812-1814 (1984).

The government also cites in its petition United States v. Scott, 437 U.S. 82 (1978), and Lee v. United States, 432 U.S. 23 (1977). Neither is apposite to this case. In Scott, the Court permitted a government appeal when the trial was terminated due to excessive preindictment delay. In Lee, the government was allowed to appeal an order dismissing the indictment for failure to state an element of the offense. Both those cases involve legal dismissals for defects in the indictment. In the present case the district court acquitted respondents after the government failed to prove the charges, not for a defect in the indictment.[7]

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[7] Indeed, the district court had upheld the propriety of the indictment, in the face of respondents' pretrial challenges to

The decision of the court of appeals in this case in no way conflicts with United States v. Maker, 751 F.2d 614 (3d Cir. 1984), cert. denied, 105 S.Ct. 3479 (1985), contrary to the government's assertion. In Maker, the defendants were charged with one mail fraud scheme involving insurance claims arising out of two auto accidents. The district court, after hearing the opening statements and the testimony of one government witness, dismissed the indictment on the grounds that the government would not be able to show that the entire scheme of both accidents was planned in advance. The court of appeals held the government's appeal was not barred by the Double Jeopardy Clause because the district court was incorrect in determining that advance planning was an element of the offense, and that this erroneous legal ruling had not resolved any factual element in the defendant's favor. The district court in Maker had "dismissed the indictment on the motion of Maker, but denied Maker's motion for a judgment of acquittal." 751 F.2d at 619-620. The court of appeals noted that had the case proceeded farther than opening statements and the first witness it might have found that the district court's decision was fact-based. 751 F.2d at 622 n.18.

Thus, Maker is not in conflict at all with the present case. The district court in the present case, only after hearing the government's entire case, granted a judgment of acquittal. This judgment was fact-based on the government's failure to prove the scheme to defraud. As the court of appeals stated:

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it. It was not the indictment that was found wanting, but rather the government's factual proof.

> The actions and words of the district court clearly show that it evaluated the government's evidence under the prevailing legal standards and determined that that evidence was legally insufficient to sustain a wire fraud conviction as indicted. This can only amount to an acquittal on all thirteen counts that went to trial.

Petition, Appendix A, p. 7a.

CONCLUSION

The court of appeals correctly applied the well-established standards of this Court. The decision is not in conflict with any other case. This issue is unlikely to arise again, given this Court's reversal of Miller. The petition for a writ of certiorari should therefore be denied.

DATED: July 16, 1986

Respectfully submitted,

JAMES E. HEWITT
Federal Public Defender

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AFFIDAVIT OF MAILING

James F. Hewitt, a member of the bar of this Court, certifies that pursuant to Rule 28 of this Court, he filed and served the within Brief of Respondent in Opposition to Government's Petition for Writ of Certiorari with the Clerk of this Court and on counsel for petitioner, respectively, by depositing said memorandum, and copies thereof, in the United States Mails at San Francisco, California, on July 17, 1985, first class, postage pre-paid within the time allowed for filing, the Petition having been received by respondent on June 19, 1986.

Service was made upon counsel for petitioner at the following address:

Honorable Charles Fried
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

All other parties required to be served here have been served.

JAMES F. HEWITT
Federal Public Defender

Counsel for Respondent LANE

Subscribed and sworn to before me
on this 17th day of July, 1985

Martha Sandham
Deputy Clerk, United States District Court